No. 200,568-3

FAIRHURST, J. (dissenting) – The majority describes this case as one of an attorney who has "practiced law for 34 years without a disciplinary history, and his misconduct is isolated to a single client and a single legal action lasting over approximately two months, and does not fall within the type of conduct for which disbarment is usually imposed for a first offense." Majority at 31. In so doing, the majority selectively uses the facts to arrive at the conclusion it desires: a suspension. The majority's analysis ignores that Stephen K. Eugster failed to abide by Mrs. Marion Stead's objectives and filed a guardianship petition that he knew lacked any factual or legal basis against Mrs. Stead, a vulnerable victim. If successful, the guardianship petition would have financially benefited Eugster through attorney fees, but instead, it ended up costing Mrs. Stead $13,500 and her relationship with her son. The majority's reasoning discards our well-settled attorney discipline sanction analysis in favor of a confusing, contradictory scheme that lacks any standards. I cannot join in the majority's incomplete and flawed reasoning. The only conclusion that can be drawn from our well-settled sanction analysis and

precedent is Eugster should be disbarred. I dissent.

A. Sanction analysis overview

Although it does not follow the methodology, the majority initially correctly describes the methodology the American Bar Association (ABA) and this court have historically used for assessing the sanction. After determining that an attorney has violated the Rules of Professional Conduct (RPCs), we first examine the duty violated, the state of mind, and the harm to the victim to arrive at a presumptive sanction through the lens of the ABA *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) (ABA *Standards)* standards 4.0-8.0. *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 195, 117 P.3d 1134 (2005); ABA Standards at 5. The presumptive sanction serves as a starting point to the ultimate sanction. After the presumptive sanction is determined, mitigating and aggravating factors are considered to determine if the presumptive sanction should be modified. *Kronenberg*, 155 Wn.2d at 195; ABA Standards at 5.

Both the hearing officer and the Washington State Bar Association (WSBA) Disciplinary Board (Board) go through this process independently to fashion a recommended sanction. *In re Disciplinary Proceeding Against Cohen*, 150 Wn.2d 744, 754, 82 P.3d 224 (2004). Both the hearing officer and Board serve important

functions to be given great deference. The hearing officer is the only adjudicative body to assess the credibility of witnesses and make findings. *In re Disciplinary Proceeding Against Stansfield*, 164 Wn.2d 108, 125, 187 P.3d 254 (2008). The Board has unique experience and perspective in the administration of sanctions because it is "'the only body to hear the full range of disciplinary matters'" in all contested Washington disciplinary cases. *Cohen*, 150 Wn.2d at 754 (internal quotation marks omitted) (quoting *In re Disciplinary Proceeding Against Anschell*, 141 Wn.2d 593, 607, 9 P.3d 193 (2000) (*Anschell* I)).

Although we are not bound by the Board's recommendation, we will not lightly deviate from the Board's recommendation. *Id.*; *see also In re Disciplinary Proceeding Against Anschell*, 149 Wn.2d 484, 501-03, 69 P.3d 844 (2003) (*Anschell* II) (discussing need of the hearing officer and Board to recommend a presumptive sanction for each violation). If raised, we consider the two remaining *In re Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 667 P.2d 608 (1983), factors before imposing sanctions: (1) the proportionality of the sanction to other instances of misconduct and (2) the extent of the agreement among the members of the Board. *In re Disciplinary Proceeding Against Schwimmer*, 153 Wn.2d 752, 764, 108 P.3d 761 (2005). Applying this methodology, I now analyze what

sanction Eugster should receive.

B. Duty

We first look to the duty or duties violated to understand the type of harm and who was affected by the acts of the attorney. "The extent of the *injury* is defined by the type of duty violated and the extent of actual or potential harm." ABA Standards at 6. The reason we look to the duties violated is because the sanction analysis segregates itself according to whom the duty was owed. *See id.* at 5 (stating the first question a court imposing sanctions should answer is, "[w]hat ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)"). For example, standard 4.0 discusses the presumptive sanctions to administer when there is a violation of a duty owed to clients, standard 5.0 covers violations of duties owed to the public, standard 6.0 covers violations of duties owed to the legal system, and so forth. To determine which duties were violated, we must look to the counts of misconduct that describe the RPCs the attorney violated. Because each count can potentially involve multiple duties, we must examine the duties violated in those counts for purposes of later determining which standard should apply.

Here, the hearing officer, Board, and members of this court agree Eugster

committed seven counts of misconduct. I will analyze those counts separately to determine which duties were violated.[1]

1. Count one: violation of former RPC 1.2(a) (2002)

When Eugster violated former RPC 1.2(a)[2] by "fail[ing] to abide by the client's objectives of representation, which were to remove her son Roger from control of her affairs, re-take control of her financial affairs and re-claim property she believed Roger had kept in violation of her wishes," he violated a duty owed as a professional. Disciplinary Board Order Adopting Hr'g Officer's Decision with Amendments (Board Order) at 12-13. The hearing officer and the unanimous Board correctly applied standard 7.0 to determine the presumptive sanction. ABA Standards at 5.

2. Count two: violation of former RPC 1.6(a) (1990)

When Eugster violated former RPC 1.6(a)[3] by telling his "client's son he believed she was delusional, and when he signed a guardianship petition in which he

[1]In a dissent, one does not ordinarily have to go through each violation of an RPC to assess what kind of duty was violated. However, as the majority never discusses the type of duty violated, I will explain which standard applies for each count.

[2]Former RPC 1.2(a) provides that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued."

[3]Former RPC 1.6(a) provides, "[a] lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation."

used her personal information and set forth her financial condition and his impression of her, formed during his estate planning work he disclosed confidences relating to the representation," he violated a duty owed to the client. Findings of Fact, Conclusions of Law, Hr'g Officer's Recommendation (FOFCOL) at 12, ¶ 2.27. The hearing officer and the unanimous Board correctly applied standard 4.2 to determine the presumptive sanction. ABA Standards at 5.

3. Count three: violation of former RPC 1.8(b) (2000) and 1.9(b) (1985)

When Eugster violated former RPC 1.8(b)[4] and 1.9(b)[5] by "us[ing] secrets and confidences to Mrs. Stead's disadvantage," he violated a duty owed to the client. Board Order at 13; FOFCOL at 24, ¶ 3.3. Although the hearing officer and unanimous Board did not explain which standard they applied, standard 4.2 is used to determine the presumptive sanction. ABA Standards at 5.

4. Count four: violation of former RPC 1.9(a) (1985)

When Eugster violated former RPC 1.9(a)[6] by representing himself in the

[4]Former RPC 1.8(b) provides that an attorney shall not use information relating to the representation to the disadvantage of a current client unless the client consents in writing after consultation.

[5]Former RPC 1.9(b) dictates that an attorney shall not use the confidences or secrets of a former client relating to the representation to the disadvantage of the former client.

[6]Former RPC 1.9(a) prevents a lawyer from representing "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts."

guardianship action to advance interests adverse to Mrs. Stead, he violated a duty owed to a client. Board Order at 27; FOFCOL at 15, ¶¶ 2.34, 2.35. The hearing officer and the unanimous Board correctly applied standard 4.3 to determine the presumptive sanction. ABA Standards at 5.

5. Count five: violation of former RPC 1.15(d) (1985)

When Eugster violated former RPC 1.15(d)[7] by failing to turn over Mrs. Stead's files despite Andrew Braff's repeated requests, Eugster violated a duty owed to a client. FOFCOL at 16, ¶ 2.38. The hearing officer and the unanimous Board correctly applied standard 4.1 to determine the presumptive sanction. ABA Standards at 5.

6. Count eight: violation of former RPC 3.4(c) (1985)

When Eugster violated former RPC 3.4(c)[8] because he violated CR 11 by failing to make a "reasonable inquiry about Ms. Stead's mental condition," Eugster violated a duty owed to the legal system. FOFCOL at 16. The hearing officer and unanimous Board correctly applied standard 6.2 to determine the presumptive

[7]Former RPC 1.15(d) provides that "[a] lawyer shall take steps to the extent reasonably practicable to protect a client's interests, . . . surrendering papers and property to which the client is entitled."

[8]Former RPC 3.4(c) provides that a lawyer shall not "[k]nowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

sanction. ABA Standards at 5.

7. Count nine: violation of former RPC 8.4(d) (2002)

When Eugster violated former RPC 8.4(d)[9] by pursuing the guardianship action against Mrs. Stead to install himself as the trustee and attorney in fact over Ms. Stead's assets, Eugster violated a duty owed as a professional. FOFCOL at 18, ¶¶ 2.42-2.45. The hearing officer and unanimous Board correctly applied standard 7.0 to determine the presumptive sanction. ABA Standards at 5-6.

To recap, we apply standard 4.0 to determine the presumptive sanction for the violations of duties outlined in counts two, three, four, and five; standard 6.0 to determine the presumptive sanction for the violation of the duty outlined in count eight; and standard 7.0 for the violations of duties outlined in counts one and nine.

The majority notes, and I agree, it is important to look at the duties themselves because we should base our sanction, in part, on to whom the attorney owed a duty. As the majority and the ABA *Standards* agree, the most important duty is owed to the client. ABA Standards at 5. If a lawyer violates a duty owed to a client as compared to a duty owed to the general public, the legal system, or as a professional, then we, like the ABA *Standards* framework, should use that fact in our sanction analysis.[10]

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[9]Former RPC 8.4(d) prohibits an attorney from "[e]ngage[ing] in conduct that is prejudicial to the administration of justice."

[10]Of course, that is not to say that an attorney cannot commit serious misconduct by

While the majority recognizes we must look to the duties violated, and even recognizes that several duties were violated here, the majority does not analyze what duties were violated. By not examining the types of duties implicated by Eugster's misconduct, the majority's approach runs counter to our established case law. *See Anschell* II, 149 Wn.2d at 506; *In re Disciplinary Proceeding Against Cramer*, 165 Wn.2d 323, 339, 198 P.3d 485 (2008); *In re Disciplinary Proceeding Against Trejo*, 163 Wn.2d 701, 723-27, 185 P.3d 1160 (2008); *In re Disciplinary Proceeding Against Burtch*, 162 Wn.2d 873, 897-98, 175 P.3d 1070 (2008); *Kronenberg*, 155 Wn.2d at 195-96; *In re Disciplinary Proceeding Against Lopez*, 153 Wn.2d 570, 583-88, 592-93, 106 P.3d 221 (2005).

Instead of examining the duties, the majority uses a sleight of hand to transform the analysis to hold that Eugster's charges of misconduct can be reduced to two acts of misconduct. Majority at 24-26. The majority justifies its action by citing a statement in *Schwimmer* where we said we focus on the most serious act in determining the appropriate sanction because the "'ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations.'" 153 Wn.2d at 759 (internal quotation

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violating a duty owed to the general public, the legal system, or as a professional. Like the ABA *Standards*, we should adjust our sanction analysis according to the type of duty violated.

marks omitted) (quoting *In re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 135, 94 P.3d 939 (2004)). There are several problems with this analysis.

The majority tries to use *Schwimmer* to (a) reduce the misconduct into as few separate acts as possible and (b) reduce the ultimate sanction. The majority's attempt misapplies *Schwimmer*. *Schwimmer* states that the ultimate sanction should at least be consistent with the most serious sanction that could be imposed among the various violations. In order to determine the most serious sanction, we first have to determine what the presumptive sanction is for each violation. *See Anschell* II, 149 Wn.2d at 502 (stating the hearing officer and Board should examine each violation, even if the presumptive sanction for one of the violations is disbarment). Only after the *Schwimmer* court determined one of the presumptive sanctions was disbarment did the court cut short the analysis. It was unnecessary to examine the other charges and saved us time and pages to simply handle the issue summarily when we were a unanimous court imposing a sanction of disbarment.

Next, the majority's analysis of the number of acts of misconduct is not relevant to determining the types of duties violated. The number of acts is not even relevant to determining the presumptive sanction except to the extent it determines the number of RPC violations that are at issue.[11]

[11]Do not misunderstand me to argue that the number of separate acts of misconduct is not

Because the majority's analysis appears to be altering our presumptive sanction analysis, I have grave concerns with the implications. The majority's holding will cause confusion for subsequent attorney discipline cases because it will now be questionable whether the hearing officers, Board, and this court should look at the duties violated. Under the majority's analysis, all counts of misconduct will be reduced into as few related episodes of misconduct as possible. It does not make sense to base the presumptive sanction on as few episodes of misconduct as possible because the point of finding the presumptive sanction is to create a standardized sanction for the attorney's actions and the resulting harm in the context of the RPCs violated. Because the majority fails to properly analyze what duties were violated, and instead simply states there were two episodes of misconduct, there is no standard like those articulated in standards 4.0-8.0 that can be used to find Eugster's presumptive sanction.

relevant to the ultimate sanction. It is, and I will provide that analysis below. I argue the majority puts the cart before the horse by looking at the number of acts without even analyzing what duties were violated.

C. Mental state

After determining the types of duties violated, we next determine the attorney's mental state. All of our prior case law holds that we are to give strong deference to the hearing officer. *See Cramer*, 165 Wn.2d at 332 ("we often recognize that the hearing officer is in the best position to determine factual findings regarding a lawyer's state of mind and his decision is given 'great weight' on review." (quoting *In re Disciplinary Proceeding Against Longacre*, 155 Wn.2d 723, 744, 122 P.3d 710 (2005))); *In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 208, 125 P.3d 954 (2006). In *Anschell* II, we explicitly declined an invitation to make determinations of mental state and extent of harm, stating:

> We decline, for several reasons, to make the initial determination of the applicable mental state and extent of harm in connection with each of the violations. Both inquiries are factual in nature, and the hearing officer is in the best position to make such determinations based upon the evidence presented.

149 Wn.2d at 501. We give such deference to the hearing officer because the hearing officer is the only adjudicative body to have the opportunity to listen to the witnesses, assess their demeanor, talk to the charged attorney, and make credibility findings. *See Cohen*, 150 Wn.2d at 754. "Ordinarily we should not disturb the factual findings made by the hearing officer upon conflicting evidence." *Cramer*,

165 Wn.2d at 333. Without citation to any authority, the majority states we reserve the right to determine how much weight to give the findings of mental state. Majority at 28. By this statement, the majority enables this court to engage in credibility and factual findings. That is not our role--nor should it be.

We are to analyze an attorney's mental state for purposes of deriving a presumptive sanction. To determine the presumptive sanction, we look to standards 4.0-8.0, using the duty violated. In those standards, with the exception of standard 4.1 (count five), the presumptive sanction generally will be disbarment if the attorney, with the intent to benefit himself or another, knowingly committed the misconduct. The presumptive sanction generally will be a suspension if the attorney acted only knowingly (without the intent to benefit himself or another).

The ABA *Standards* defines "'[k]nowledge'" for purposes of determining whether the lawyer knowingly engaged in misconduct[12] as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." ABA Standards at 7; *see*

[12]Assessing the mental state for purposes of determining the presumptive sanction involves a different analysis than determining if the attorney violated an RPC. Most RPCs (and all but one RPC violated here) do not require a finding of a mental state in order to have a violation. Unless the RPC requires, we look to the mental state only to determine the sanction. For example, except for count eight, the WSBA did not need to prove Eugster's mental state to prove a violation of the RPCs.

*Trejo*, 163 Wn.2d at 722. We have consistently treated this as a knew or should have known standard. *See In re Disciplinary Proceeding Against Behrman*, 165 Wn.2d 414, 421, 423, 197 P.3d 1177 (2008); *Stansfield*, 164 Wn.2d at 123;[13] *In re Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 416, 98 P.3d 477 (2004); *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 870, 64 P.3d 1226 (2003).

In looking at whether the attorney knowingly committed the misconduct with the intent to benefit the lawyer or another, "intent" is defined as "the conscious objective or purpose to accomplish a particular result."[14] ABA Standards at 7; *Stansfield*, 164 Wn.2d at 123 (stating, "'[I]n cases where we have found an attorney acted with an intentional state of mind, generally the attorney's intent was to benefit herself or himself.'" (alteration in original) (quoting *Poole*, 156 Wn.2d at 239

[13]In *Stansfield*, the attorney was charged with a violation of former RPC 1.2(f) (2002), which provides, "'[a] lawyer shall not *willfully* purport to act as a lawyer for any person without the authority of that person.'" *Stansfield*, 164 Wn.2d at 119 (emphasis added) (alteration in original). To prove a violation of former RPC 1.2(f), the WSBA had to prove Stansfield had a willful mental state. Since *Stansfield*, we still use the knew or should have known standard in our sanction analysis of a violation of an RPC that has no mental state element. *See Behrman*, 165 Wn.2d at 418, 421.

[14]The majority states there are three possible mental states an attorney could have--intentional, knowing, or negligent--and implies that the sanction is segregated by those mental states. Majority at 28. That distinction is imprecise. To prove Eugster should be disbarred, the WSBA was not required to prove Eugster acted intentionally. According to the ABA *Standards* used to determine Eugster's presumptive sanction, except for count five, the difference between a presumptive sanction of suspension and a presumptive sanction of disbarment is whether Eugster acted knowingly or acted knowingly with the intent to benefit himself or another. ABA Standards stds. 4.0-8.0.

(Madsen, J., dissenting))). In determining whether the attorney intended to benefit himself or herself or another, we do not look only at the statements made by the attorney regarding his or her mental state. Rather, we look at what knowledge was available and the extent to which the attorney acted in conformity with that knowledge to determine if the attorney knowingly acted with the intent to benefit himself or herself. *See In re Disciplinary Proceeding Against Miller*, 149 Wn.2d 262, 281, 66 P.3d 1069 (2003) (examining an attorney's actions to hold the attorney knowingly used an incapacitated client to loan him money with the intent to never repay); *Poole*, 156 Wn.2d at 221 (holding, contrary to the attorney's argument otherwise, the objective facts demonstrate an attorney acted knowingly with the intent to deceive the court). For example, if the evidence suggests the attorney knew if he or she committed certain acts, the attorney would receive a benefit to himself or herself, and the attorney took those acts, then the fact finder could find the attorney acted knowingly with the intent to benefit himself or herself.[15]

As the hearing officer repeatedly found, Eugster acted with the intent to benefit himself or Roger. Board Order at 26, 29; FOFCOL at 11-18, ¶¶ 2.26, 2.35, 2.38, 2.43-2.45, 3.1-3.9, 3.11. Eugster knew Mrs. Stead hired him to remove

[15]This type of intent is focused on whether the attorney acted to benefit the attorney or another. It is not, as the majority hints, that the attorney has to intend all of the consequences of his or her actions.

Roger's control over her estate, to return property in Roger's possession, and to draft a new will and trust. Eugster knew he drafted documents giving himself power over Mrs. Stead's estate in the event she became incompetent. He also knew Roger was a secondary trustee under the trust and had secondary power of attorney. Eugster knew if Mrs. Stead retained another attorney, Eugster would lose the power over Mrs. Stead's estate and the right to the accompanying fees.

With regard to count one, the evidence demonstrates Eugster knowingly failed to abide by Mrs. Stead's objectives with the intent to benefit himself or another. The proof that Eugster intended to benefit himself or Roger is that Eugster knew documents existed granting him power over Mrs. Stead's estate in the event of her death or incompetency. He knew of these documents because he drafted them. He knew he was entitled to fees when he controlled the estate, and he knew the hiring of Braff would no longer entitle Eugster to the power over the estate and the fees. Eugster's actions in refusing to recognize the termination of representation and filing the petition for guardianship was consistent with his knowledge that such acts would ensure he retained power over the estate and received the fees. More than substantial evidence exists to demonstrate Eugster acted with the intent to benefit himself.

With regard to counts two and three,[16] Eugster knowingly disclosed confidences and secrets to Roger, a third party, to the disadvantage of Mrs. Stead and with the intent to benefit Eugster. The analysis here is similar to that above. Eugster acted in conformity with his preexisting knowledge and coordinated with Roger to allow both of them to retain control over Mrs. Stead's estate, fees, and her person.

With regard to counts eight and nine,[17] Eugster knowingly filed a guardianship petition that he knew had no reasonable basis with the intent to benefit himself. First, it is beyond dispute Eugster knew he filed the guardianship petition. Second, the evidence demonstrates Eugster knew he had no reasonable basis to file a guardianship petition alleging Mrs. Stead was incompetent. At the time of filing on September 27, 2004, Eugster knew the last day he or Roger had talked to Mrs. Stead was August 4, 2004. Eugster knew that in June 2004 Mrs. Stead executed documents naming Eugster as personal representative over her will, successor trustee over her trust, and having power of attorney, and he had no concerns about Mrs. Stead's competency at that time. Eugster knew a psychologist determined

[16]Because counts two and three both go to Eugster's disclosure of client confidences and secrets to Roger, they are combined for purposes of this analysis.

[17]Because counts eight and nine both go to Eugster's filing of the guardianship petition without conducting an adequate investigation, they are combined for purposes of this analysis.

Mrs. Stead had testamentary capacity during an examination in January 2004. Transcript at 413. Despite those facts, Eugster conducted no investigation to prove Mrs. Stead's incompetency by the time he filed the guardianship petition. More than substantial evidence demonstrates Eugster filed the guardianship petition knowing it lacked a reasonable basis.

Substantial evidence supports finding that Eugster knowingly filed the guardianship petition with the intent to benefit himself. As already mentioned, Eugster drafted legal documents granting him power over Mrs. Stead's estate should Mrs. Stead become incompetent. He knew the termination of his representation of Mrs. Stead would end his ability to retain that power over her estate. Eugster would benefit through the attorney fees he requested in the petition and the control over the estate's assets by maintaining his status as having power of attorney and being the successor trustee over Mrs. Stead's estate. By filing the guardianship petition, Eugster acted in conformity with his knowledge that Mrs. Stead's being found incompetent would preserve his control over her estate. More than substantial evidence demonstrates Eugster filed the guardianship petition with the intent to benefit himself.

The majority's analysis suffers several glaring problems. By focusing

extensively on whether Eugster subjectively intended the results of his actions, the majority contradicts itself in several areas. The majority appears to state Eugster knew he would benefit from his acts, but concludes Eugster did not intend to benefit himself. If Eugster knew his actions would lead to his financial benefit, and he took those actions, then Eugster intended to benefit himself. The majority appears to state Eugster believed Mrs. Stead was incompetent, but it also states Eugster knew he had not reasonably investigated whether Mrs. Stead was incompetent. If Eugster knew he did not have enough factual information to form a reasonable belief Mrs. Stead was incompetent, then Eugster knew there was no factual basis to file a guardianship petition declaring Mrs. Stead to be incompetent. The majority's analysis in this section becomes so confusing from these contradictions that, in the end, it never explains what mental state Eugster actually had. Majority at 26-30.

The hearing officer correctly concluded that, in addition to intending to benefit himself financially, Eugster had a mental state far more culpable than that of financial benefit because he substituted his judgment for that of his client for his own personal benefit. It is for this reason the hearing officer repeatedly mentions Eugster substituted his judgment for that of Mrs. Stead. FOFCOL at 19, 29-33. The hearing officer was particularly troubled that Eugster would take actions

entirely contrary to the objectives of Mrs. Stead because Eugster believed he knew better and he or Roger would benefit from those actions. *Id.*

Ironically, by concluding Eugster's primary motive was to substitute his judgment for Mrs. Stead's, the majority substitutes its judgment for the hearing officer and undermines the entire findings of the hearing officer. To achieve its result, the majority removes all deference to the hearing officer, who was able to assess the credibility of the witnesses and speak with Eugster face-to-face. As we have consistently and repeatedly held, the hearing officer is in the best position to make the finding of mental state. *Stansfield*, 164 Wn.2d at 125 (holding that we defer to the hearing officer's finding of mental state over the Board's determination of mental state and stating, "[w]e give great weight to a hearing officer's determination of an attorney's state of mind because it is a factual finding"); *Poole*, 156 Wn.2d at 208; *Trejo*, 163 Wn.2d at 721; *Longacre*, 155 Wn.2d at 744. Even the majority concludes the evidence supports the hearing officer's findings. Majority at 21. We should not disturb the hearing officer's findings.

Under the majority's analysis, to prove the charged attorney acted with intent to benefit himself or another, the WSBA must show the attorney acted in bad faith. According to the majority, if an attorney can claim he or she subjectively believed

the actions were for the benefit of the client, then the lawyer did not act with intention to benefit himself or another. The majority puts Eugster's statements regarding his mental state above any contrary inference that could be drawn from Eugster's actions. Such an approach has several problems. First, the majority assumes the role as fact finder, a role this court is not qualified to play. Second, the majority creates a nearly irrefutable defense. All the attorney would have to do is claim he or she was acting for the benefit of the client and the defense would apply.[18]

The majority finds because Eugster wrote a letter advising Mrs. Stead to act in a manner inconsistent with Eugster's financial interest, Eugster's primary motivation was not for his financial interest. The majority confuses the analysis. We are not trying to determine if the attorney's motivation for self-benefit was

[18]As the majority enjoys hypothetical situations to demonstrate its logic, majority at 26 n.23, I provide my own to demonstrate the flaws in the majority's analysis: There are two attorneys. *Attorney 1* knowingly withdrew money from his client's trust account, used the money to go to Tahiti and drink mai tais, and admitted to all of those facts. *Attorney 2* withdrew money from her client's trust account but, instead, gave the money to a charity operated by the attorney. When questioned, *Attorney 2* said she took the money out of the trust account and gave the money to the charity to help the reputation of the client. Under the majority's analysis, *Attorney 1* acted intentionally and might be disbarred while *Attorney 2* did not act intentionally and will not be disbarred because *Attorney 2* might have acted in subjectively good faith. While there is some visceral appeal to the majority's analysis, I submit that *Attorney 2* is equally, if not more, culpable than *Attorney 1*. In addition to benefiting herself or another (the charity), *Attorney 2* denied the client the ability to dictate if and how the client would improve her reputation. *Attorney 2* not only profited herself but also substituted her judgment for her clients. I submit it is bad enough *Attorney 1* took the client's money for her own benefit, but *Attorney 2*, in addition to taking the client's money, took away the client's autonomy to define her own reputation.

greater than any other motivation. We are determining whether the attorney intended to benefit himself or another. Here, Eugster's actions were consistent with his knowledge that he would benefit by them.

Substantial evidence supports the hearing officer's and unanimous Board's conclusion Eugster knowingly violated the RPCs with the intent to benefit himself or another. The majority's failure to reach this conclusion, or any explicit conclusion as to Eugster's intent to benefit himself or another, creates a situation that rewards attorneys for substituting their judgment for their clients' and undoubtedly will confuse subsequent attorney discipline proceedings.

D. Harm

The majority correctly concludes the injury and potential injury to Mrs. Stead and the integrity of the legal profession was serious and substantial. Majority at 30.

E. Presumptive Sanction

To determine the presumptive sanction, we look at the duties violated, the attorney's mental state, and the extent of the injury caused. The reason we look to the duties violated is to determine which standard applies. ABA Standards stds. 4.0-8.0. Upon determining the applicable standard, we look to the attorney's mental state and the extent of the injury to arrive at a presumptive sanction. *See Anschell*

II, 149 Wn.2d at 506; *Cramer*, 165 Wn.2d at 339; *Trejo*, 163 Wn.2d at 723-27; *Burtch*, 162 Wn.2d at 897-98; *Kronenberg*, 155 Wn.2d at 196; *Lopez*, 153 Wn.2d at 583-88, 592-93. After determining the presumptive sanction for each count, we then start with the harshest presumptive sanction because the ultimate presumptive sanction must be at least as severe as the sanction for the most serious offense. *See Anschell* II, 149 Wn.2d at 502; *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 346, 157 P.3d 859 (2007).

1. Count one: violation of former RPC 1.2(a)

In count one, Eugster violated a duty owed as a professional, so standard 7.0 applies. ABA *Standards* standard 7.1 provides:

> Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and caused serious or potentially serious injury to a client, the public, or the legal system.

Eugster knowingly filed the guardianship petition against Mrs. Stead without a reasonable investigation in response to her termination of his employment. He committed such acts for the purpose of benefiting himself, and they caused serious injury to Mrs. Stead in that she had to spend $13,500 to defend herself in the guardianship proceeding. The hearing officer and unanimous Board correctly determined under standard 7.1 that the presumptive sanction for count one is

disbarment.

2. Count two: violation of former RPC 1.6(a)

In count two, Eugster violated a duty owed to his client to preserve confidences, so standard 4.2 applies. ABA *Standards* standard 4.22 states, "[s]uspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client." Eugster knowingly disclosed information regarding Mrs. Stead to Roger when they prepared and filed a guardianship petition over Mrs. Stead. The disclosure resulted in a financial loss to Mrs. Stead and the loss of the relationship of her son. The hearing officer and unanimous Board correctly determined under standard 4.22 the presumptive sanction for count two is suspension.

3. Count three: violation of former RPC 1.9(b)

In count three, Eugster violated a duty owed to the client, so standard 4.0 applies. ABA *Standards* standard 4.21 provides, "[d]isbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client." Eugster knowingly revealed information he gained through his

estate planning work for Mrs. Stead. Eugster's disclosures were not permitted by former RPC 1.9(b). The hearing officer also found Eugster acted with a selfish motive because he had a financial interest assuming control of her estate should Mrs. Stead be found incompetent. Eugster's actions humiliated Mrs. Stead, permanently damaged her relationship with Roger, and caused her to spend $13,500 litigating the matter. The hearing officer did not make any findings regarding the presumptive sanction for count three. Disbarment is the presumptive sanction under standard 4.21.

4. Count four: violation of former RPC 1.9(a)

In count four, Eugster violated a duty owed to the client to avoid conflicts of interest, so standard 4.3 applies. ABA *Standards* standard 4.32 provides, "[s]uspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client." Eugster knowingly filed a guardianship petition against his former client while claiming it was for the benefit of the client. The petition caused injury to Mrs. Stead because she had to spend $13,500. The hearing officer and unanimous Board correctly determined under standard 4.32 the presumptive sanction for count four is suspension.

5. Count five: violation of former RPC 1.15(d)

In count five, Eugster violated a duty owed to the client to surrender files, so standard 4.1 applies. ABA *Standards* standard 4.12 provides, "[s]uspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." Eugster knowingly refused to turn over Mrs. Stead's files to Braff until after the conclusion of the guardianship proceeding, even after Braff repeatedly requested the files and well after Eugster had withdrawn from the guardianship proceeding. The failure to turn over Mrs. Stead's files caused injury as Braff had to recreate Mrs. Stead's files and documents. The hearing officer and unanimous Board correctly determined under standard 4.12 the presumptive sanction for count five is suspension.

6. Count eight: violation of former RPC 3.4(c)

In count eight, Eugster violated a duty owed to the legal process, so standard 6.2 applies. ABA *Standards* standard 6.21 provides, "[d]isbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a

legal proceeding." Eugster knowingly violated CR 11 by filing the guardianship petition without reasonably investigating into the factual merits. He filed the petition with the intent to benefit himself because he would control Mrs. Stead's assets if she were found incompetent. The injury to Mrs. Stead is serious as not only did she have to spend money defending herself, but Eugster's guardianship petition isolated Mrs. Stead from Roger. The hearing officer and unanimous Board correctly determined under standard 6.21 the presumptive sanction for count eight is disbarment.

7. Count nine: violation of former RPC 8.4(d)

In count nine, Eugster violated a duty owed as a professional, so standard 7.0 applies. ABA *Standards* standard 7.1 provides:

> Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and caused serious or potentially serious injury to a client, the public, or the legal system.

Eugster knowingly filed a guardianship petition with no independent investigation of Mrs. Stead, whom he alleged was his client in the petition. Eugster filed the petition without Mrs. Stead's knowledge or consent. The petition was drafted in response to Mrs. Stead's termination of Eugster's representation. If the petition had been successful, Roger would have been Mrs. Stead's guardian, which was directly

contrary to Mrs. Stead's objectives. The guardianship would have given Eugster control over her assets and attorney fees for his work. The filing resulted in serious injury to Mrs. Stead. Her relationship with Roger was permanently damaged and she incurred $13,500 in costs to defend herself against a baseless guardianship petition. The hearing officer and unanimous Board correctly determined under standard 7.1 the presumptive sanction for count nine is disbarment.

8. The presumptive sanction for Eugster's misconduct

Having identified the individual presumptive sanctions, we next determine the presumptive sanction for all of Eugster's misconduct. The sanction must be at least as severe as the sanction for Eugster's most serious violation. Four of the counts have a presumptive sanction of disbarment. As that is the most severe sanction we can impose, the presumptive sanction for Eugster's misconduct is disbarment.

The majority, however, holds that the presumptive sanction is a suspension. Majority at 32. The majority divines its presumptive sanction by focusing on the facts that Eugster practiced law for 34 years without a disciplinary history, his misconduct is isolated to a single client and a single legal action lasting over approximately two months, and the misconduct does not fall within the type of conduct for which disbarment is usually imposed for the first offense. Majority at

31-32. In so doing, the majority ignores our well-established case law, contradicts itself, and is outcome determinative.

In arriving at its presumptive sanction, the majority never mentions the duties violated, Eugster's mental state, or the injury caused. While the majority's facts can be relevant to the ultimate sanction, the presumptive sanction is not and should not be based on these facts.

The reason we follow the ABA *Standards* and our prior case law is to promote

> (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

ABA Standards std. 1.3.[19] Determining the presumptive sanction by looking at the duties violated, the mental state, and the extent of injury helps serve all three of those purposes because it looks only at the misconduct and what would be a standard sanction for that type of misconduct. Determining the aggravating and mitigating factors and the proportionality of the sanction later on ensures the

[19]In the beginning of its analysis, the majority stresses the importance of flexibility and creativity in fashioning a sanction. Majority at 22. While the majority also notes consideration of all relevant factors and consistency in imposition of sanctions are also important, majority at 24, it does not recognize the ABA *Standards* was created to make sanctions more consistent. ABA Standards at 1.

attorney not only receives a sanction tailored to the specific acts that violated the RPCs but also that the sanction accounts for the attorney's conduct as a whole. By ignoring the well-established practice of using the duties violated, the mental state, and the extent of injury, the majority imposes a sanction based upon an incomplete analysis. Rather than looking at the relevant factors, the majority's reasoning is outcome determinative because it cherry picks the factors it deems relevant to determine the sanction it wants.

Under the majority's analysis, I cannot discern how hearing officers, the Board, and this court will determine the presumptive sanction in the future. It appears this court will be able to pick whatever facts will justify its conclusion. Subsequent hearing officers and Board recommendations will no longer matter, or at least matter very little. The sanction imposed will be whatever we say it is, for whatever reason we provide. That is not a standard to follow, and that is not a standard that should be followed. The majority's presumptive sanction of suspension runs counter to precedent and the ABA *Standards*. The majority's analysis will leave hearing officers, Boards, and this court in a confusing, contradictory state where, ultimately, the presumptive sanction will be determined by the whims of this court.

F. Aggravating and mitigating factors

Once we determine the presumptive sanction, we next consider any aggravating and mitigating factors. *Marshall*, 160 Wn.2d at 342. I agree with the majority that the hearing officer's and Board's findings of aggravating and mitigating factors should be affirmed. I disagree with the majority's decision to give less weight to the aggravating factor of dishonest or selfish motive because the majority misstates the standard we apply.

The majority reduces the weight of the factor because it believes Eugster's motive for substituting his judgment for his client's is not as important as acting for his own financial interest. But, at the same time, the majority states Eugster's substituting his judgment for Mrs. Stead's shows he "'fails to grasp the most fundamental tenant [sic] of law practice, serve your client, protect their confidences. The damage to the profession [here] is bad.'" Majority at 32 (quoting FOFCOL at 32). It is contradictory to reduce the weight of an aggravating factor of dishonest or selfish motive while also stating substituting a lawyer's judgment for his client's violates the fundamental tenet of law practice.

The majority also argues the weight should be reduced because the "evidence is more equivocal as to his motive to take control over Mrs. Stead's finances."

Majority at 33. The majority misstates the standard we apply at this posture. While the evidence may have been equivocal during the hearing, the hearing officer was able to assess the credibility of the witnesses and render its decision. The hearing officer implicitly found Eugster not credible as to his motive and made the general finding that "Mr. Eugster has failed to be honest and trustworthy." FOFCOL at 33. A unanimous Board agreed. Yet, without stating the finding is not supported by substantial evidence, the majority reduces the weight given to the aggravating factor of dishonest or selfish motive because there was a contest of credibility. To give less weight to the aggravating factor because there is a dispute of credibility amounts to this court placing itself into the role of fact finder rather than acting as an appellate court. *See Cramer*, 165 Wn.2d at 332 (stating we give great deference to the hearing officer's findings of credibility); *Stansfield*, 164 Wn.2d at 125 (stating same). The majority errs in reducing the weight of the aggravating factor of dishonest or selfish motive.

Even if we were to give little or no weight to the aggravating factor of dishonest or selfish motive, there are four other aggravating factors and one mitigating factor. The majority does not examine if those factors alter the ultimate sanction. Even assuming the majority is correct, i.e., that the presumptive sanction

is suspension and the aggravating factor of dishonest or selfish motive is given little or no weight, the weight of the remaining aggravating factors leads to the sanction of disbarment.

The remaining four aggravating factors are: (1) multiple offenses, (2) vulnerability of victim, (3) refusal to acknowledge wrongful nature of conduct, and (4) substantial experience in the practice of law.

First, Eugster committed multiple offenses. This is not an instance of one brief episode of misconduct. Eugster not only filed a guardianship petition without reasonable investigation, he also failed to abide by his client's objectives, disclosed Mrs. Stead's confidences to Roger without her permission, and purposefully refused to return Mrs. Stead's files that rightfully belonged to her. With regard to the failure to abide by Mrs. Stead's objectives, Eugster did not just fail to abide by one of Mrs. Stead's objectives, he failed to abide by all of her objectives. He did not return her property that was in Roger's possession; he did not take steps to remove Roger's control over Mrs. Stead's assets, but instead took steps to increase Roger's control over the assets; and although not misconduct, he did not resolve the problems with the allocation of resources from Mrs. Stead's trust. Eugster committed multiple offenses through multiple independent acts. At numerous points, Eugster had the

opportunity to avoid committing misconduct, yet he did not. Given the number of opportunities and the number of offenses, a harsher sanction is warranted.

That Eugster committed these egregious acts against a vulnerable victim also tips the scale toward imposing a harsher sanction. I need to go no further than to quote the hearing officer's justification for finding the aggravating factor of a vulnerable victim:

> [Mrs.] Stead was an elderly grieving widow suffering from depression and physical health problems who had lost her husband less than six months prior to her hiring Respondent Eugster. In addition, she had recently left her home of more than twenty years, and was distraught over the state of her relationship with her only child.

FOFCOL at 22, ¶ 3.1. This court must protect victims of attorney misconduct, particularly when the attorney is out to take advantage of a vulnerable victim. As Eugster did just that, a harsher sanction is warranted.

The hearing officer and unanimous Board found that Eugster has refused to acknowledge the wrongful nature of his conduct. Eugster does not challenge those findings. As Eugster has shown no remorse of the wrongful nature of his conduct, a harsher sanction should be imposed.

Finally, Eugster has substantial experience in the practice of law. He has practiced law for 34 years, and, given his experience, Eugster should have been

more attentive to the ethical duties he owed to his client, the legal profession, and the legal system. Because Eugster committed misconduct despite his substantial experience in the practice of law, a harsher sanction should be imposed.

There is only one mitigating factor--no prior disciplinary history. The remaining four aggravating factors outweigh the mitigating factor. Each of the aggravating factors undermines the purpose of the mitigating factor, which provides leniency to an attorney for behaving appropriately until committing misconduct. Even though Eugster had no prior disciplinary history, he still committed multiple acts of misconduct, took advantage of a vulnerable client, has yet to acknowledge the harmful nature of his conduct, and should have been more attentive to his ethical duties given his years of experience. Weighing the aggravating and mitigating factors demonstrates Eugster deserves a harsher sanction than a suspension. The majority errs by not weighing the aggravating and mitigating factors at all.

G. Proportionality

After we determine the presumptive sanction in light of the relevant aggravating and mitigating factors, we consider whether the sanction is appropriate according to the two remaining *Noble* factors, but only if the disciplined attorney raises the issue. *In re Disciplinary Proceeding Against Holcomb*, 162 Wn.2d 563,

592, 173 P.3d 898 (2007). We generally affirm the Board's recommendation unless the sanction lacks proportionality or the Board's decision lacked unanimity. *Burtch*, 162 Wn.2d at 900; *see Trejo*, 163 Wn.2d at 734 (stating, "we will adopt the Board's recommended sanction 'unless we are able to articulate specific reasons for adopting a different sanction'" (quoting *Noble*, 100 Wn.2d at 95)). The Board agreed unanimously with the hearing officer's recommended sanction of disbarment. The only remaining *Noble* factor at issue is the proportionality of the sanction to the misconduct.

The attorney bears the burden to show how the Board's recommended sanction is not proportionate. *Marshall*, 160 Wn.2d at 349; *In re Disciplinary Proceeding Against VanDerbeek*, 153 Wn.2d 64, 97, 101 P.3d 88 (2004) (stating, "the attorney facing discipline must bring forth cases demonstrating the disproportionality of the sanction imposed" (citing *In re Disciplinary Proceeding Against Kagele*, 149 Wn.2d 793, 821, 72 P.3d 1067 (2003))). Eugster asks this court to consider our decisions in *Burtch*, *Marshall*, *Poole*, and *Stansfield*.

When considering whether the recommended sanction is proportionate, we consider other cases where we affirmed or rejected the same sanction. *Marshall*, 160 Wn.2d at 348. For example, the disciplined attorney in *Trejo* failed to prove to

the court that his suspension was disproportionate by comparing it to another case where the presumptive sanction was less severe than his presumptive sanction. 163 Wn.2d at 734. Like Trejo, Eugster tries to persuade the court that his presumptive sanction lacks proportionality by comparing his sanction to three cases where the presumptive sanctions were less severe than disbarment. *See Stansfield*, 164 Wn.2d at 129 (finding reprimand the presumptive sanction); *Marshall*, 160 Wn.2d at 350 (finding suspension the presumptive sanction); *Poole*, 156 Wn.2d at 223 (finding reprimand the presumptive sanction). None of the cited cases assist the court in determining whether disbarment is a disproportionate sanction.

*Burtch*, on the other hand, involves a presumptive sanction of disbarment. In *Burtch*, this court adopted the Board's recommendation to disbar an attorney for knowingly or intentionally "advancing a meritless defense in district court, failing to pay restitution as ordered by the Board, failing to adequately explain the fee agreement, charging unreasonable fees, and failing to return unearned fees." *Burtch*, 162 Wn.2d at 897. The court noted Burtch had a long history of misconduct. *Id.* at 898. The court also found ten aggravating factors but no mitigating factors to augment the presumptive sanction. *Id.* at 898-99.

Eugster violated multiple ethical duties, the presumptive sanction for which is

disbarment. Unlike *Burtch*, these RPC violations are Eugster's first disciplinary misconduct. However, the recommendation from the hearing officer and Board takes into account Eugster's unblemished record as a mitigating factor. Unfortunately, the existence of five aggravating factors outweighs the lone mitigating factor and should not compel the court to grant leniency. Eugster has failed to demonstrate how the recommended sanction of disbarment lacks proportionality.

The majority, in its proportionality analysis, notes Eugster's arguments regarding the cases, but with the exception of a fleeting citation to *Burtch*, never mentions the cases again. Instead, the majority creates a new proportionality analysis and holds that the sanction of disbarment would be disproportionate because Eugster's case does not fit into four general categories the majority creates. Majority at 34-36. We have never so generalized attorney discipline cases where the sanction was disbarment. When we have held a recommended sanction was disproportionate, we focused on the similarities between the case at issue and a particular prior case. *See In re Disciplinary Proceeding Against Dynan*, 152 Wn.2d 601, 623-24, 98 P.3d 444 (2004); *Romero*, 152 Wn.2d at 133-34. Such a focus was appropriate so we could impose a consistent and principled sanction

based on the misconduct and the acts of the attorney. We should follow our precedent and focus on the cases cited by Eugster in examining the proportionality of Eugster's sanction.

The majority's use of four general categories of cases where we disbarred attorneys has several glaring flaws. First, the categories are too general in nature. The majority posits we should impose individualized sanctions based on the facts, majority at 23-24, yet it tries to pigeonhole all disbarment cases into one of four general categories. I submit the better approach is to follow the step-by-step approach of determining the presumptive sanction, assessing the aggravating and mitigating factors, giving high deference to a unanimous Board, and looking at specific cases for proportionality.[20] Such an approach ensures both an individualized sanction and a sanction that is proportionate to other similar factual scenarios.

Next, the majority's general categories unnecessarily limit the instances when we can, and have, disbarred an attorney. In *Miller*, we disbarred an attorney for drafting a will that named the attorney as a beneficiary, borrowing against a client's

[20]I also take issue with the majority's citation to the WSBA discipline notices posted online. Majority at 35 nn.28-31. Those notices have no precedential value because they involve disbarments resulting from defaulted hearings or stipulations. As a result, the notices are unhelpful to determining whether a sanction is proportionate.

certificate of deposit, and having a doctor declare the client incapacitated without conducting any examination. 149 Wn.2d at 268-73. While the attorney's conduct was no doubt egregious, it did not technically constitute a felony, forgery, fraud, misappropriation of client funds, or an extreme lack of diligence. Similarly, in *Romero*, we disbarred an attorney for numerous ethical violations involving fee issues, a lack of diligence, a failure to pay income taxes, and noncooperation with the WSBA. 152 Wn.2d at 128-32. While the presumptive sanction for each of the violations was at most, a suspension, we held the multiple violations warranted an increase in the sanction to disbarment. *Id.* at 135-36; *see also In re Disciplinary Proceeding Against Huddleston*, 137 Wn.2d 560, 974 P.2d 325 (1999) (holding an attorney did not commit perjury in a civil action, but holding the attorney should still be disbarred because of his misconduct). The majority unnecessarily restricts our ability to conduct the inquiry and impose what could be an appropriate sanction.[21]

[21]The majority's categories do not recognize disbarment if "a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client," ABA *Standards* std. 4.51; if "a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client," ABA *Standards* std. 4.21; if a lawyer fails to avoid conflicts of interest or if "a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client," ABA *Standards* stds. 4.31, 4.61; or if "a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding," ABA *Standards* std. 6.21. The majority's categories do not even recognize

The majority in the proportionality analysis again states it would be unusual "to disbar a lawyer who does not have a disciplinary history for misconduct involving a single client in a single proceeding for conduct [lasting] two months." Majority at 35. First, it is incorrect to say Eugster's misconduct involved a single proceeding and only two months.[22]

Eugster's misconduct did not involve only one legal proceeding, and even if it did, it is not a ground for a more lenient sanction. While there was only one petition before a court, Eugster's misconduct involves more than one legal act. The hearing officer, unanimous Board, and even the majority concluded Eugster failed to abide by his client's objectives, disclosed client confidences to a third party, used confidences to the disadvantage of a client or former client, failed to return papers and property to which the client was entitled, and filed a guardianship petition without making a reasonable inquiry. As the hearing officer, unanimous Board, and even the majority correctly concluded, there were multiple offenses. His offenses involve different legal acts and omissions. It was not simply one legal proceeding.[23]

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disbarment of a lawyer who repeatedly commits misconduct throughout his or her career so long as the misconduct does not include a felony, forgery, fraud, a misrepresentation to a tribunal, misappropriation of client funds, or extreme lack of diligence. Majority at 34-35.

[22]Also, the fact Eugster directed his misconduct to only one client is not dispositive of his sanction. As the majority readily admits, Eugster committed multiple instances of misconduct against Mrs. Stead.

[23]The majority's use of the terms "single proceeding" and "single legal action" is unclear. Majority at 35, 36. Such terms lack standards. It can include anything from an attorney's entire

Eugster's misconduct lasted far longer than two months. Mrs. Stead hired Eugster in August 2004, with instructions that Eugster handle estate matters and return Mrs. Stead's property in Roger's control. Eugster never returned the property, which the majority agrees constitutes misconduct. Thus, the misconduct began in August. While Eugster withdrew his name from the guardianship petition in November, Eugster did not return Mrs. Stead's files until February 2005. Eugster's misconduct spanned at least five months from August 2004 to February 2005.

But even if Eugster's misconduct only lasted two months, it makes no sense to reduce a sanction based on the amount of time it took to commit the misconduct. Serious misconduct can occur in a second. To base a sanction on the amount of time it took to perpetrate the misconduct creates an arbitrary analysis that has nothing to do with the actual misconduct and the injury caused. Because of the arbitrary nature, I cannot tell from the majority whether Eugster's sanction would be different if his misconduct lasted 3 months, a year, or 10 years. It makes better sense to fashion a sanction based on the amount of harm the victim suffered from the attorney's misconduct.

The cases cited by Eugster demonstrate the sanction of disbarment would be

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representation of a client or just one case the attorney tried for a client.

proportionate to his misconduct. By ignoring our case law, creating four general categories, and misapplying its own test, the majority fails to properly analyze the proportionality of Eugster's sanction. Finally, by justifying its sanction on selected facts that do not fully describe Eugster's misconduct, the majority creates an arbitrary test and disregards the ABA *Standards*.

H. Sanction

After determining the presumptive sanction, weighing the aggravating and mitigating factors, examining the proportionality, and reviewing the unanimous Board recommendation, it is clear the appropriate sanction is disbarment. Because the majority does not reach this conclusion, I dissent.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Chief Justice Gerry L. Alexander

Justice Barbara A. Madsen

J. Robert Leach, Justice Pro Tem.